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In the Supreme Court of the United States

OCTOBER TERM, 1979

HARVEY B. YOUNG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a criminal defendant's trial by a jury drawn from the judicial district in which his offense was committed, but from a division of the district other than the division in which the offense was committed, violates the Sixth Amendment.

2. Whether the district court abused its discretion in admitting evidence of conduct not charged in the indictment, but relevant to the issue of unlawful intent or knowledge.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 1980. The court of appeals denied the defendant's petition for rehearing on May 1, 1980 (Pet. App. B). On May 13, 1980, Mr. Justice Blackmun extended the time for filing a petition for a writ of certiorari until June 30, 1980; the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a trial in the United States District Court for the Eastern District of Missouri, petitioner was convicted on two counts of misapplication of bank funds, in violation of 18 U.S.C. 2 and 656, and five counts of mail fraud, in violation of 18 U.S.C. 2 and 1341. The district court sentenced petitioner to concurrent terms of two years' imprisonment on each count and fines totalling $10,000. The court of appeals affirmed.

At trial the government introduced evidence to show that shortly after moving to Lancaster, Missouri in the spring of 1973, William Lyman, a commodities broker, established a commodities brokerage firm with Eddie Norman, a local businessman, and Junior Liston (Pet. App. A-3). Petitioner, who was president of the Bank of Kirksville, Missouri, together with Norman and Barry Gushleff, a close friend of petitioner, had convinced Lyman that a commodities brokerage business in northeastern Missouri would prove profitable (Pet. App. A-2 to A-3). About the same time as Lyman and his associates established the brokerage firm, petitioner Gushleff, and several other local professional men set up

an investment club to pool their resources for investment in the commodities markets (*id.* at A-3). Pursuant to contract, the brokerage firm was to handle the investments of the club in return for a percentage of the club's profits (*ibid.*).

In the summer of 1973, petitioner met with Norman and Lyman, two of the founders of the brokerage firm, to discuss methods for generating cash. The three agreed that cash could be generated by kiting checks between Norman's accounts at petitioner's Kirksville bank and Lyman's accounts at other local banks (Pet. App. A-2 to A-3).[1] Shortly thereafter, to create inflated balances in these accounts, worthless checks drawn on Lyman's account at a bank in Schuyler County were deposited in Norman's account. Simultaneously, checks drawn on Norman's account at the Kirksville bank were deposited in Lyman's Schuyler County bank account. When the president of the Schuyler County bank demanded payment on two of Norman's checks, petitioner directed that they be honored despite his knowledge that Norman's account contained insufficient funds (Pet. App. A-5). Petitioner continued to facilitate the scheme by honoring other kited checks drawn on Norman's account and by mailing checks drawn on other banks to the regional Federal Reserve System bank for negotiation (Pet. App. A-5 to A-8).

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[1] As the court below explained, check kiting involves the creation of inflated balances in checking accounts by the exchange of checks of similar amounts between two accounts. During the delay resulting from the clearing process, the parties have the use of the deposited but uncollected balance in both accounts. (Pet. App. A-4 n.2.)

ARGUMENT

The decision of the court of appeals is correct and, contrary to petitioner's assertions (Pet. 10, 17-18), does not conflict with any decision of this Court or any other court of appeals. Nor does the decision of the court of appeals conflict with the holding of any case in the highest court of any state. Accordingly, further review is both unnecessary and unwarranted.

1. The offenses charged in the indictment occurred in the Eastern District of Missouri; the jury was drawn from the eastern judicial district of the State of Missouri. Petitioner contends that the Sixth Amendment, which requires that a criminal defendant be tried by a "jury of the State and district wherein the crime shall have been committed," also requires that a defendant be tried by a jury drawn from the particular division of the "district" in which the crime was committed. There is nothing in the language of the Sixth Amendment, its history, or any of the federal court decisions construing the provision to support that contention. See, *e.g.*, *United States* v. *Mase*, 556 F. 2d 671, 675 (2d Cir. 1977), cert. denied, 435 U.S. 916 (1978); *Zicarelli* v. *Gray*, 543 F. 2d 466, 475-482 (3d Cir. 1976) (en banc); *United States* v. *Brown*, 535 F. 2d 424, 429-430 (8th Cir. 1976). "The [S]ixth [A]mendment prohibits courts only from obtaining petit jurors from beyond the boundaries ot two large units, the state and the federal judicial district." *Zicarelli* v. *Gray*, *supra*, 543 F. 2d at 481.[2]

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[2]Rule 18, Fed. R. Crim. P., provides no support for petitioner's argument. First, the rule speaks only of "the place of trial" and not the place from which the jurors are to be drawn. Second, at all times relevant to this case, the rule authorized the district court to fix the place of trial at any place within the district in which the offense was committed.

Jurors may be drawn from the entire district or from one division of that district. *E.g.*, *Ruthenberg* v. *United States*, 245 U.S. 480, 482 (1918); *United States* v. *Florence*, 456 F. 2d 46, 48-50 (4th Cir. 1972); *United States* v. *Gottfried*, 165 F. 2d 360, 364 (2d Cir.), cert. denied, 333 U.S. 860 (1948).[3] In accordance with federal jury selection procedures, the United States District Court for the Eastern District of Missouri selected jurors from the Eastern Division, where the trial was held. That a panel of jurors drawn from the Northern Division might have included a greater or lesser number of "rural" jurors is of no constitutional significance.

This Court's decisions in *Duren* v. *Missouri*, 439 U.S. 357 (1979), and *Taylor* v. *Louisiana*, 419 U.S. 522 (1975), provide no support for petitioner's argument in this case. Both cases involved intentional and systematic exclusion of "distinct" classes of otherwise eligible persons from jury service.[4] There is no evidence in this case that the jury

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[3]The Jury Selection and Service Act of 1968, 28 U.S.C. 1861, provides that "all litigants in the Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district *or division wherein the court convenes*" (emphasis added). Indeed, Section 29 of the Judiciary Act of 1789, ch. 20, 1 Stat. 88, which was enacted contemporaneously with the Sixth Amendment, authorized jury selection practices that resulted in the exclusion of residents of portions of the federal judicial district. See *Ruthenberg* v. *United States*, *supra*, 245 U.S. at 482; *Zicarelli* v. *Gray*, *supra*, 543 F. 2d at 477-478, 481, citing *United States* v. *Stowell*, 27 F. Cas. 1350, 1354 (C.C.D. Mass. 1854) (No.16,409).

[4]In *Duren* v. *Missouri*, *supra*, 439 U.S. at 360, state law automatically exempted from jury service any woman requesting such an exemption; this Court concluded that the under representation of women in the jury pool was the result of the statutory exemption system. *Id.* at 367. Similarly, in *Taylor* v. *Louisiana*, *supra*, 419 U.S. at 523, state law excluded women from jury service absent a written declaration evidencing the desire to be subject to jury service.

selection procedure used by the district court involved any "intentional" or "systematic" exclusion of persons with rural backgrounds.[5] Furthermore, the relevant "community" for purposes of the Sixth Amendment fair cross-section requirement is the community from which the jury is drawn. See *Duren* v. *Missouri*, *supra*, 439 U.S. at 365; *Taylor* v. *Louisiana*, *supra*, 419 U.S. at 531. In this case, the relevant "community" is the area comprising the Eastern Division of the Eastern District of Missouri. Petitioner does not contend that there was any under representation of persons with rural backgrounds in the venire from which the jury was selected in relation to the number of such persons in the Eastern Division, or in relation to the number of such persons in the Eastern District of Missouri.[6]

The racial overtones of both *Alvarado* v. *State*, 486 P. 2d 891 (Alaska 1971) and *People* v. *Jones*, 510 P. 2d 705, 108 Cal. Rptr. 345 (1973), virtually eliminate any support the language in those cases might otherwise provide for petitioner's argument here. Relying heavily on the sociological, anthropological, and psychological evidence in *Alvarado* that demonstrated the profound cultural differences between Native Alaskan villagers and

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[5]Indeed, as the court below noted (Pet. App. A-13), several persons with rural backgrounds were, in fact, included on a list of prospective jurors, but petitioner struck them from the jury.

[6]*Thiel* v. *Southern Pacific Co.*, 328 U.S. 217 (1946), and *Strauder* v. *West Virginia*, 100 U.S. 303 (1879), also involved intentional and systematic exclusion of distinct classes of individuals from jury service. In addition, however, neither is based upon the Sixth Amendment. In *Thiel*, the Court relied on its power to supervise the administration of justice in the federal courts to hold that the systematic exclusion of "day laborers" from jury service was impermissible in a civil case. In *Strauder*, the Court held that a black defendant's right to the equal protection of the laws was infringed by a state law that excluded all blacks from jury service.

urban residents, the court held that a jury selection system that excluded all but 35 Native Alaskans from the pool of potential jurors was impermissible where the defendant was a Native Alaskan and the crime was committed in an "Alaska Native village." Similarly, in *People* v. *Jones*, the court held that a jury selected from a state judicial "district" in which the black population was only 7% was impermissible where the crime had been committed in a neighborhood that was 73% black and located in another state judicial "district" in which the population was 31% black.

2. Petitioner's contention (Pet. 13-19) that the government improperly introduced evidence of uncharged misconduct is insubstantial.

At trial the government introduced evidence showing that petitioner was an active and essential participant in the check kiting activities of several of his close friends and business associates. Petitioner's defense was essentially that he was unaware of the check kiting activities and therefore lacked the requisite intent (Pet. 2; Tr. 967-968). The Lyman-Gushleff check kite, referred to in the court of appeals' opinion as the "Kirksville-Green City Kite," was simply one in a series of cash generating schemes. Petitioner's role in mediating the dispute between Gushleff and Lyman as to the net result of their check-kiting activities was admissible under Rule 404(b), Fed. R. Evid., to show that his lack of knowledge defense was incredible. Although petitioner was not charged with any criminal conduct arising out of the "Kirksville-Green City Kite," the court of appeals properly found that the district court had not abused its discretion in admitting evidence of petitioner's participation in this affair.

Petitioner contends that under Rule 404(b) "the evidence must pertain to crimes committed *by the*

defendant on trial" (Pet. 15). The evidence of the check-kiting activities of Lyman and Gushleff was a necessary predicate to the evidence relating to petitioner's role as the mediator of the dispute that arose out of that scheme. Rule 404(b) permits the introduction of evidence "of other crimes * * * *or acts*" to prove "intent, * * * plan, knowledge, * * * or absence of mistake or accident." Evidence of a criminal defendant's "acts" may often demonstrate criminal activity on the part of his colleagues. See, *e.g.*, *United States* v. *McDonald*, 576 F. 2d 1350, 1356-1357 (9th Cir.), cert. denied, 439 U.S. 927 (1978); *United States* v. *Cady*, 567 F. 2d 771, 774-775 & n.3 (8th Cir.), cert. denied, 435 U.S. 944 (1978). Nevertheless, the evidence is admissible under Rule 404(b), unless its probative value on the issues of intent or knowledge is "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence," Rule 403, Fed. R. Evid. See, *e.g.*, *United States* v. *McDonald, supra*, 576 F. 2d at 1356; *United States* v. *Cady, supra*, 567 F. 2d at 775 n.3. The district court's resolution of this issue was plainly within its discretion, as the court of appeals found.[7]

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[7]According to petitioner "[o]ver 40 exhibits and 60 pages of testimony pertained solely" to the Kirksville-Green City Kite (Pet. 13). Even if true, petitioner's assertion provides no basis for finding an abuse of discretion. The "exhibits" referred to are individual checks and constitute less than 4% of the total number of exhibits introduced at this trial.

United States v. *O'Connor*, 580 F. 2d 38 (2d Cir. 1978), relied on by the petitioner (Pet. 17-18), is not to the contrary; the court excluded the evidence of uncharged criminal activity because it was irrelevant to any disputed issue in the case. Here, in contrast, the major issue was petitioner's knowledge and intent.

United States v. *Beechum*, 582 F. 2d 898 (5th Cir. 1978) (en banc), does not support petitioner's assertions here. Indeed, that case further establishes the correctness of the court of appeals' decision in this case. In *Beechum*, the Fifth Circuit held that evidence of the defendant's possession of two credit cards issued to others and stolen from the mail was admissible in a trial in which the defendant was charged with unlawful possession of a coin that had been stolen from the mail. The only defense asserted was lack of unlawful intent. Beechum testified that he had not intended to keep the coin and planned to turn it over to the proper authorities. The government introduced evidence suggesting that the defendant had possessed the stolen credit cards for about 10 months, which the court found was relevant to his intent to return the coin and, therefore, admissible under Rule 404(b) since its probative value was not substantially outweighed by the likelihood of unfair prejudice. Similarly, in this case the government introduced evidence that substantially lessened the credibility of petitioner's claim that he had no knowledge of his friends' check-kiting activities.

Petitioner apparently relies on the language in the long passage from *Beechum* reproduced in his petition (Pet. 16) relating to the need to establish that the defendant "committed the offense" to support the proposition that the evidence of the Kirksville-Green City Kite was inadmissible because it related to "crimes by other persons" (see Pet. 17). The term "offense," as used in *Beechum* includes " 'other crimes, wrongs, or acts,' as set forth in Fed. R. Evid. 404(b)." 582 F. 2d at 903 n.1. Therefore, in context, the passage relied upon requires that the government prove only that the crime, wrong, or act "was in fact committed and the defendant committed" it. The government clearly established that Young was informed of the kiting activities of Lyman and Gushleff

and that he mediated the dispute that arose out of those activities.[8]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[8]Petitioner's reliance upon *United States* v. *Mann*, 590 F. 2d 361 (1st Cir. 1978), and *United States* v. *Vosper*, 493 F. 2d 433 (5th Cir. 1974), is also misplaced. In *Mann*, the court held inadmissible evidence that, a year prior to a charged drug smuggling offense, the defendant was present when an acquaintance was arrested for transporting cocaine. The court reasoned that, because different persons, methods of operations, and smuggling routes were involved, there was no logical nexus between this incident and the charged offense. 590 F. 2d at 369. Here, by contrast, the uncharged kiting incident, like the charged offense, involved petitioner's confederates, the same method of operation involving use of his bank, and the same time frame. In *Vosper*, the court held inadmissible evidence that the defendant on trial for bank robbery was observed near the scene of a prior robbery committed by a co-defendant, because there was no showing that the defendant was connected with the prior robbery in any way. 493 F. 2d at 437. But here the evidence showed not only that petitioner was aware of the scheme, but that he participated in it by mediating a dispute among his confederates.

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